

**COURT OF APPEALS
DECISION
DATED AND FILED**

May 19, 2016

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

**Appeal Nos. 2015AP817
2015AP818
STATE OF WISCONSIN**

**Cir. Ct. Nos. 2013PR646
2013CV3237**

**IN COURT OF APPEALS
DISTRICT IV**

IN RE THE ESTATE OF RALPH M. BENJAMIN:

DIANE L. BENJAMIN,

APPELLANT,

v.

**DALE S. BENJAMIN, AS PERSONAL REPRESENTATIVE OF THE ESTATE
OF RALPH M. BENJAMIN,**

RESPONDENT.

IN RE THE RALPH M. BENJAMIN REVOCABLE TRUST:

DIANE L. BENJAMIN,

PETITIONER-APPELLANT,

v.

DALE S. BENJAMIN,

TRUSTEE-RESPONDENT.

APPEALS from orders of the circuit court for Dane County:
JUAN B. COLAS, Judge. *Affirmed.*

Before Higginbotham, Sherman and Blanchard, JJ.

¶1 PER CURIAM. Diane Benjamin appeals an order of the circuit court denying her motion to amend a pleading to assert claims related to the alleged improper transfer of marital property by her husband, Ralph Benjamin, during their marriage. For the reasons discussed below, we affirm.

BACKGROUND

¶2 Ralph Benjamin died testate on September 8, 2013. Ralph was survived by his spouse of twenty-nine years, Diane, and his eight children from a prior marriage. Dale Benjamin, one of Ralph’s sons, filed a request for informal probate. December 20, 2013, was set as the deadline for filing claims against Ralph’s estate.

¶3 On October 10, 2013, Diane filed a document entitled “Petition for Spousal Elections and Classification of Property” with the probate court under the case number of the pending probate matter. Diane’s “Petition” asserted in relevant part that Diane was “concerned that [Ralph] may have improperly gifted marital property without [her] consent” during their marriage and that she “petition[ed] to exercise the following spousal elections: a. Recovery of [her] share of any marital property; and b. Recovery of [her] share of any deferred marital property”

¶4 In September 2014, Diane moved the circuit court for leave to file “an amended petition that more specifically identifies claims based upon the improper gifting/distribution of marital property that was generally described” in Diane’s October 2013 “Petition.” The amended petition that Diane sought leave

to file asserted causes of action against Ralph's estate and/or Ralph's children. Nearly all the causes of action that Diane sought to assert were related to Ralph's alleged improper gifting of marital property and included the following: the recovery of marital property under WIS. STAT. § 766.70(6) (2013-14);¹ unjust enrichment; breach of the duty of good faith; fraud; constructive trust; and the recovery of Diane's elective share in the deferred marital property. Diane also sought leave to assert a claim against Ralph's estate for unjust enrichment based upon the care she provided to Ralph during the last two years of Ralph's life.

¶5 The circuit court denied Diane's motion to amend. The court concluded that Diane's exclusive remedy for the recovery of improperly gifted marital property is WIS. STAT. § 766.70(6)(a), and that to pursue a claim under that statute, Diane needed to have filed an action by summons and complaint against Ralph's estate and/or the gift recipients. The court concluded that Diane had not filed an action under § 766.70(6)(a) and that the statute of limitations had run on any claim she had under § 766.70(6)(a). Diane appeals.

DISCUSSION

¶6 Diane contends that the circuit court erred in denying her request to file an amended petition in which she sought to assert claims against Ralph's

¹ All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

estate and Ralph's children under WIS. STAT. § 766.70(6)(a) to recover marital property she alleges Ralph improperly gifted to his children.²

¶7 A circuit court's decision to allow the amendment of a pleading is discretionary and we will affirm that decision if the court applied the correct law to the relevant facts and reached a reasonable result. *Gosse v. Navistar Int'l Transp. Corp.*, 2000 WI App 8, ¶16, 232 Wis. 2d 163, 605 N.W.2d 896. When a circuit court's exercise of discretion depends upon the interpretation of a statute, we review that legal issue de novo. *Goff v. Seldera*, 202 Wis. 2d 600, 616, 550 N.W.2d 144 (Ct. App. 1996).

¶8 Diane sought to allege in an amended pleading causes of action related to Ralph's alleged improper gifting of marital property. WISCONSIN STAT. § 766.70 sets forth the remedies for the breach of good faith by spouses in matters involving marital property. We have stated that the remedies provided in § 766.70 are the exclusive remedy for any spouse who disputes the transfer of marital property. *Socha v. Socha*, 204 Wis. 2d 474, 481, 555 N.W.2d 152 (Ct. App. 1996); see WIS. STAT. § 766.53 (delineating permissible gift-giving of marital property). Where, as here, an alleged improper gift of marital property becomes effective prior to the death of the gifting spouse, § 766.70(6)(a) applies. This paragraph allows a person to bring an action to recover improper gifts against the donating spouse or the gift's recipient. Sec. 766.70(6)(a). However, the action must be commenced within the earliest of one year after the non-donating spouse

² Diane's brief on appeal addresses only whether she properly brought an action under WIS. STAT. § 766.70(6)(a), and whether she should have been permitted to assert a claim of constructive trust against Ralph's children. As noted in ¶4, Diane sought to assert numerous other claims in her amended complaint. We conclude that Diane has abandoned on appeal any argument as to those claims.

has notice of the gift or before the deadline for filing a claim under WIS. STAT. § 859.01³ after the death of either spouse. *Id.*

¶9 Diane asserts that prior to Ralph’s death, she was not aware that Ralph had made any improper gifts of marital property during their marriage. The respondents do not dispute this. The deadline for filing claims against Ralph’s estate was set for December 20, 2013, which is less than one year after the date of Ralph’s death. Accordingly, Diane can sustain her WIS. STAT. § 766.70(6)(a) claim only if she “commence[d] [an] action” to enforce her claim prior to December 20, 2013. *See* § 766.70(6)(a).

¶10 Diane did not file a summons and complaint against Ralph’s estate or Ralph’s children asserting a claim under WIS. STAT. § 766.70(6)(a) prior to December 20, 2013. She argues, however, that her “Petition for Spousal Elections and Classification of Property,” which was filed in the probate proceeding, served as a commencement of an action under § 766.70(6)(a) to recover her interest in any improperly gifted marital property. Diane devotes substantial argument to the issue of whether she could bring a § 766.70(6)(a) claim in the probate proceeding. Arguing that she could, Diane asserts that probate proceedings are “broad [in] scope,” that WIS. STAT. § 859.02, which addresses the limitation on claims that may be asserted in a probate matter, does not “limit[] [] the type of claim that can be pursued in probate through the filing of a petition, ” and that § 766.70(6)(a) does not “expressly forbid[] improper gifting claims” from being brought in a

³ WISCONSIN STAT. § 859.01 provides: “When an application for administration is filed, the court, or the probate registrar under informal administration proceedings, shall by order set a date as the deadline for filing a claim against the decedent’s estate. The date shall be not less than 3 nor more than 4 months from the date of the order. If a claim is not filed by the deadline, the consequences provided in s. 859.02 apply.”

probate proceeding “or otherwise state[] that the claims may only be pursued through a certain type of lawsuit.” Diane also argues that the fact that § 766.70(6)(a) utilizes the deadline for filing claims in a probate proceeding as the cutoff date for § 766.70(6)(a) claims is indicative that § 766.70(6)(a) claims may be brought in a probate proceeding.

¶11 However, we need not, and do not, address whether Diane is correct that a WIS. STAT. § 766.70(6)(a) claim may be brought in a probate proceeding because we conclude that even assuming for purposes of argument only that Diane is correct, Diane’s “Petition for Spousal Elections and Classification of Property” did not commence an action under § 766.70(6)(a).

¶12 When interpreting a statute, we begin with the language of the statute. *State ex rel. Kalal v. Circuit Court for Dane County*, 2004 WI 58, ¶45, 271 Wis. 2d 633, 681 N.W.2d 110. Words are to be given their common and ordinary meaning unless those words are technical or specifically defined. *Id.* Legal terms of art are to be given their accepted legal meaning. *Estate of Matteson v. Matteson*, 2008 WI 48, ¶22, 309 Wis. 2d 311, 749 N.W.2d 557. Statutory text is read not in isolation, but instead “as part of a whole; in relation to the language of surrounding or closely-related statutes; and reasonably, to avoid absurd or unreasonable results.” *Kalal*, 271 Wis. 2d 633, ¶46. Thus, the scope, context, and purpose of a statute are relevant to a plain-meaning interpretation “as long as the scope, context, and purpose are ascertainable from the text and structure of the statute itself.” *Id.*, ¶48. If the language is clear and unambiguous, we apply the plain words of the statute and ordinarily proceed no further. *Id.*, ¶46.

¶13 WISCONSIN STAT. § 766.70(6)(a) states that a person asserting an action under this paragraph must “commence [an] action” within the time periods

specified in that section. Section 766.70 does not explain what “commenc[ing] [an] action” entails. However, WIS. STAT. § 893.02, which addresses when an action is commenced, states that “Except as provided in s. 893.415(3) [relating to child support judgments], an action is commenced, within the meaning of *any* provision of law which limits the time for the commencement of an action ... *when the summons ... and the complaint are filed with the court ...*” (Emphasis added.)

¶14 WISCONSIN STAT. § 893.02 plainly states that an action is not commenced until the summons and complaint are filed. Diane’s “Petition for Spousal Elections and Classification of Property” is not a summons and complaint, and therefore, it did not “commence[.]” an action as contemplated by § 893.02. Accordingly, we conclude that Diane did not bring a WIS. STAT. § 766.70(6)(a) action within the statutory time limit. Because Diane did not timely bring a § 766.70(6)(a) claim, it was not an erroneous exercise of the circuit court’s discretion to deny Diane’s motion to amend her “Petition” to assert claims under that paragraph.

¶15 Diane makes an alternative argument involving the concept of constructive trusts. She contends that the circuit court erred in denying her request to assert a claim against Ralph’s children for a constructive trust related to any of her marital property that were improperly gifted by Ralph. Diane argues that even if she cannot bring a claim against Ralph’s children under WIS. STAT. § 766.70(6)(a) because that claim is time barred, she may, under the theory of constructive trust, recover from the children the value of her marital property that was improperly gifted to them. “[C]onstructive trust is an equitable device created by law to prevent unjust enrichment, which arises when one party receives a

benefit, the retention of which is unjust to another.” *Wilharms v. Wilharms*, 93 Wis. 2d 671, 678, 287 N.W.2d 779 (1980).

¶16 As we stated above in ¶8, we have held that the remedies set forth in WIS. STAT. § 766.70 are the exclusive remedies for a spouse who disputes the transfer of marital property. *See Socha*, 204 Wis. 2d at 480-81. Diane has not developed an argument, nor cited this court to any legal authority, supporting her assertion that constructive trust is nevertheless a permissible remedy for a spouse who disputes the transfer of marital property. We therefore do not address this argument further. *See State v. Pettit*, 171 Wis. 2d 627, 646–47, 492 N.W.2d 633 (Ct. App. 1992) (arguments unsupported by legal authority will not be considered).

CONCLUSION

¶17 For the reasons discussed above, we affirm.

By the Court.—Orders affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.

